

2013 DRAFTING REQUEST

Bill

| | | | |
|--------------|-------------------------------------|------------------|------------------------|
| Received: | 1/17/2014 | Received By: | phurley |
| Wanted: | As time permits | Same as LRB: | |
| For: | Legislative Council - LRC | By/Representing: | Mike Queensland |
| May Contact: | | Drafter: | phurley |
| Subject: | Criminal Law - miscellaneous | Addl. Drafters: | |
| | | Extra Copies: | |

Submit via email: **YES**
 Requester's email: **Michael.Queensland@legis.wisconsin.gov**
 Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Adding an expectation of privacy to the definition of oral communication for purposes of surveillance

Instructions:

See attached

Drafting History:

| <u>Vers.</u> | <u>Drafted</u> | <u>Reviewed</u> | <u>Typed</u> | <u>Proofed</u> | <u>Submitted</u> | <u>Jacketed</u> | <u>Required</u> |
|--------------|----------------------|-----------------------|-----------------------|----------------|----------------------|--------------------|-----------------|
| /? | phurley 1/22/2014 | | | _____ | | | |
| /1 | | kfollett 1/23/2014 | rschluet 1/23/2014 | _____ | mbarman 1/23/2014 | srose 2/17/2014 | |

FE Sent For:

→ Not
Needed

<END>

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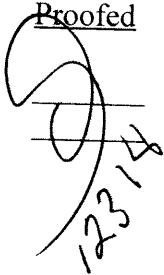
Adding an expectation of privacy to the definition of oral communication for purposes of surveillance ✓

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| /? | phurley | 1/15f 1/23 | 1/15f 1/23 |  | | | |
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FE Sent For:

<END>

Hurley, Peggy

From: Queensland, Michael
Sent: Friday, January 17, 2014 3:21 PM
To: Hurley, Peggy
Subject: RE: Law Revision Committee: drafting request

Peggy,

I agree that the term "incorporate a reasonable expectation of privacy" could support either amendment. For now though, let's go with option #2.

Thanks again for your help!

Mike

From: Hurley, Peggy
Sent: Tuesday, January 14, 2014 10:33 AM
To: Queensland, Michael
Subject: RE: Law Revision Committee: drafting request

Hi Mike,

I can draft this for you. To be clear, are you requesting that the definition of "oral communication" be amended to read:

"Oral communication" means any oral communication uttered by a person who has a reasonable expectation that the communication is private. "Oral communication" does not include any electronic communication.

Or to read:

"Oral communication" means any oral communication uttered by a person who has a reasonable expectation that the communication is private or who is exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation. "Oral communication" does not include any electronic communication.

I think the term "incorporate a reasonable expectation of privacy" could support either amendment, so please let me know which you prefer.

Peggy

From: Queensland, Michael
Sent: Tuesday, January 14, 2014 9:18 AM
To: Hurley, Peggy
Subject: Law Revision Committee: drafting request

Hi Peggy,

I would like to request a P/draft on behalf of the Law Revision Committee. The committee would like to see a draft of the holding in *State v. Duchow*, 2008 WI 57.

In *Duchow*, the defendant sought to suppress threatening statements he directed to a disabled child aboard a public school bus. The statements were recorded by the child, using a voice-activated tape recorder that his parents placed in his backpack.

The central issue in the case was whether the defendant's statements were "oral communication," as defined in s. 968.27 (12), Stats., a part of Wisconsin's "Electronic Surveillance Law." Section s. 968.27 (12), Stats defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation. 'Oral communication' does not include any electronic communication."

Generally, evidence of intercepted oral or wire communication can be introduced only if the interception was authorized by the Electronic Surveillance Law. Because the statutory procedure for the interception of oral communications was not followed in *Duchow*, the defendant had a stronger case to suppress the evidence if the court determined that his statements were "oral communication."

In *Duchow*, the defendant argued that an "oral communication" is a statement uttered under circumstances in which the speaker has a reasonable expectation that the statement will not be intercepted. The state argued that an "oral communication" is a statement uttered under circumstances in which the speaker has a reasonable expectation of privacy. The Wisconsin Supreme Court found both views reasonable and thus that the statute is ambiguous.

Looking to legislative history, the Court found the statute represents Wisconsin's implementation of the electronic surveillance portion of [Title III], the Omnibus Crime Control and Safe Streets Act of 1968. **After examining relevant federal case law, the court concluded that the overwhelming abundance of federal case law interprets 'oral communication' to incorporate a reasonable expectation of privacy and that in enacting s. 968.27 (12), Stats. the legislature did incorporate a reasonable expectation of privacy into the meaning of 'oral communication.'**

I know that you are super busy right now, but would it be possible to have a draft in the next week?

Let me know if you have any questions about this request.

As always, thank you for your help,

Mike

Mike Queensland
Wisconsin Legislative Council
(608) 266-3810
michael.queensland@legis.wisconsin.gov



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-4034/1

PJH: [signature]

2013 BILL

57
1.24-14

Gen

1
2

AN ACT ...; relating to: the definition of an oral communication for purposes of authorizing or prohibiting an interception of an oral communication.

Analysis by the Legislative Reference Bureau

Current law generally prohibits a person from aurally recording or otherwise using a device to intercept another person's (speaker's) oral communications unless a court has authorized the interception or unless the person is a party to the communication or the speaker or another party to the communication has given permission for the interception. Current law defines "oral communication" in part as any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation.

Wisconsin

In *State v. Duchow*, 2008 WI 57, 310 Wis. 2d 1, 749 N.W.2d 913, 05-2175, the Supreme Court held that the definition of "oral communication" incorporates a reasonable expectation of privacy, and that, absent a reasonable expectation of privacy, a person is not prohibited from aurally recording or otherwise using a device to intercept a speaker's oral communication.

This bill redefines "oral communication" as one uttered by a person who has a reasonable expectation the communication is private or who is exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

BILL**SECTION 1**

1 **SECTION 1.** 968.27 (12) of the statutes is amended to read: ✓

2 968.27 (12) "Oral communication" means any oral communication uttered by
3 a person who has a reasonable expectation that the communication is private or who ✓
4 is exhibiting an expectation that the communication is not subject to interception
5 under circumstances justifying the expectation. "Oral communication" does not
6 include any electronic communication.

7 **History:** 1971 c. 40 s. 93; 1987 a. 399; 1991 a. 39; 1997 a. 218; 2009 a. 349.

(END)

Rose, Stefanie

From: Queensland, Michael
Sent: Monday, February 17, 2014 11:36 AM
To: LRB.Legal
Subject: Draft Review: LRB -4034/1 Topic: Adding an expectation of privacy to the definition of oral communication for purposes of surveillance

Please Jacket LRB -4034/1 for the ASSEMBLY.